Supreme Court, U. S.
FILED
SEP 19 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 79-612

CLAYTON RUNCK, JR.

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Robert Vogel
524 Harvard
Grand Forks, ND 58201

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

AUTHORITIES CITED

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on the 19th day of July, 1979, as amended on the 30th day of July, 1979.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It reversed the denial of the District Court of a motion to amend a sentence under Rule 35, Federal Rules of Criminal Procedure, but ordered that the case be remanded to the District Court for resentencing in accordance with the original plea agreement ("specific performance").

The opinion was issued only after a prior opinion, which granted the respondent the relief he sought (an opportunity to withdraw his plea because of

failure of the trial court to either accept or reject the plea agreement as required by Rule 11(e)(3) and (4) was withdrawn after the United States petitioned for rehearing. The opinion was withdrawn without an opportunity to the petitioner Runck to respond to the petition for rehearing.

The first opinion was dated May 16, 1979; the second opinion July 19, 1979. The latter was further amended by order of July 30, 1979, striking one sentence. Petitioner Runck petitioned for rehearing, which was denied August 21, 1979.

JURISDICTION

Jurisdiction is granted under 28 U.S.C. 1254(1).

An amendment to the final opinion of the Court of Appeals was filed July 30, 1979, and petitioner's petition for rehearing was denied August 21, 1979.

QUESTION PRESENTED

Did the Court below err in ordering the District Court to resentence in accordance with a plea agreement, which the District Court had never accepted pursuant to Rule 11(e)(3) or rejected pursuant to Rule 11(e)(4), rather than remanding for the sole purpose of allowing the defendant-petitioner to withdraw his plea, the latter being the remedy he sought and the only remedy permitted by Rule 11(e)(3) and (4)?

CRIMINAL RULE PROVISIONS INVOLVED

Federal Rules of Criminal Procedure, Rule 11(e)(3):

"(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement."

Federal Rules of Criminal Procedure, Rule 11 (e)(4):

"Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea argument."

STATEMENT OF THE CASE

Petitioner pleaded guilty, after plea negotiations, to two counts of mail fraud. The plea negotiations were disclosed to the Court, which never

specifically accepted or rejected them. The District Court imposed a sentence which contained a provision for substantial restitution (about $80,000 according to the transcript) which was no part of the plea agreement. Defendant-petitioner moved the District Court under Rule 35, Federal Rules of Criminal Procedure, to amend the sentence; the District Court denied the motion, and the defendant-petitioner appealed. The Court of Appeals held that the addition of the provision as to restitution was a "material change in the plea bargain" (p. 4, line 12, slip opinion), and that it was "a breach of the plea agreement" (p. 5). In the first and second opinions, the Court said: "Thus, Runck must be given an opportunity to withdraw his plea", but this language was stricken by the amendment of July 30.

REASONS FOR GRANTING THE WRIT

I

This is a case of first impression, involving a matter of great concern to bench, bar and public--plea negotiations and plea agreements. The District Court violated Rules 11(e)(3) and (4) -- the heart of the plea negotiation process-by failing to either accept the plea agreement and impose sentence within its terms (Rule 11(e)(3)) or reject the plea agreement and allow the defendant to withdraw his plea (Rule 11 (e)(4)). The Court of Appeals very properly found that the imposition of substantial restitution as a condition of probation was a rejection of the plea bargain, which included no provision for restitution. The Court of Appeals then should have ordered the District Court to do what the rule requires when the

plea agreement is rejected, namely, allow the defendant to withdraw his plea. (In fact, the first opinion of the Court of Appeals did just this). If that had been done, the defendant would have withdrawn the plea and gone to trial or negotiated a new plea of guilty or possibly pleaded guilty without plea negotiations. But the decision is his, and his alone, to make when a plea agreement is rejected by the court, by the plain language of Rule 11(e)(4). The Court of Appeals, by sending the case back for "specific performance" has taken from him his right to decide and has given it to the District Court. It has violated the plain mandate of Rule 11(e)(4), that the court allow the opportunity to withdraw the plea if it rejects a plea bargain.

II

The Court of Appeals errs when it

says that "no unfairness to the defendant will result from providing him with satisfaction of the bargain he attempted" (p. 5, slip opinion). The fact is that the defendant-appellant has spent more than 9 months in Leavenworth Prison on a sentence which the Court of Appeals has held to be a breach of his plea bargain (p. 5, slip opinion). It is a sentence he would not have agreed to. He would not have pleaded guilty. The sentence is therefore illegal because it was not voluntary. It violated Rule 11(d) and all of the constitutional law as to voluntariness of pleas.

III

The Court of Appeals cites no case law in support of its opinion, except Santobello v. New York, 404 U.S. 257, 262-3. Santobello is inapropos, for at least two reasons: (1) It antedates the

adoption of Rule 11(e) and is therefore, to the extent it is inconsistent, modified by Rule 11(e); and (2) Santobello involves prosecutorial misconduct and the present case involves judicial misconduct. Where prosecutors mislead the court, the remedy may well be specific performance if the defendant asks for it; when the court itself violates the Rule, the remedy provided by the Rule--withdrawal of the plea--should be ordered, if that is what the defendant asks for and the Rule requires.

IV

The authorities cited by the government in its petition for rehearing to the Court of Appeals do not support the action taken. The heart of the petition is this language from p. 5 of the Petition:

". . . Rather, where relief short of ordering withdrawal of the plea will afford the defendant the benefit of its bargain, the courts either direct specific performance[1], or leave the determination of the appropriate remedy to the trial court.[2]"

"[1]See, e.g., United States v. Bowler, 585 F.2d 851, 856 (7th Cir. 1978); United States v. Shanahan, 574 F.2d 1228, 1231 (5th Cir. 1978); Petition of Geisser, 554 F.2d 698, 706 (5th Cir. 1977); United States v. Brown, 500 F.2d 375, 378 (4th Cir. 1974).

[2]See, e.g , United States v. Thomas, 580 F.2d 1036, 1038-1039 (10th Cir. 1978); Palermo v. Warden, 545 F.2d 286, 296-297 (2d Cir. 1976); cert. denied, 421 U.S. 911 (1977); Selikoff v. Commissioner of Corrections, 524 F.2d 650, 654 (2d Cir. 1975); Mosher v. LaValle, 491 F.2d 1346, 1348 (2d Cir. 1974); Johnson v. Beto, 466 F.2d 478, 479 (5th Cir. 1972); Culbreath v. Rundle, 466 F.2d 730, 735 (3rd Cir. 1976); Cf., McAleney v. United States, 539 F.2d 282, 286-287 (1st Cir. 1976)."

Of the 4 cases cited to support an option of ordering specific performance, all four involved what the courts described as "prosecution misconduct" (Geisser and Brown), "prosecutor violation" (Bowler) pr "government misconduct" (Shanahan). Not one involves a judicial violation of Rule 11(e). They are all cases where government attorneys failed to keep their promises. Furthermore, in most (probably all, although the opinions are not specific, except in the case of Brown) the defendant did not ask to withdraw his plea. Of course, if the defendant asks for specific performance, it would not be error to give it to him. But in the case now being discussed, defendant Runck has always and only asked to withdraw his plea ever since appellate proceedings began.

None of the six cases cited in favor of permitting the trial judge to fashion a remedy is in point either. In Thomas, both the prosecutor and the judge promised that all charges would be filed before sentence, and did not keep the promises. The appellate court sent the case back for the promise to be kept. In Palermo the defendant was ordered released after he had served more time than the plea negotiations led him to believe he would receive. In Selikoff a judge refused to accept a plea bargain, as he had a right to do, and gave the defendant the right to withdraw his plea, which the defendant did not do. Of course, the appellate court held this was proper, (it is what we ask for in this case). In Mosher, the defense lawyer misled his own client and it was held that the trial court should have granted

a motion to withdraw the plea before sentence, and not having done so should allow it afterward or permit specific performance. Johnson and most of the other cases cited, involve state court action, and therefore do not relate to Federal Rule 11 at all.

Culbreath is similar to Mosher. So is McAleney, except that the court held that the defendant must be allowed to withdraw his plea unless the government promised to keep its violated promise as to recommended sentence. Thus, none of the cases involves a judicial violation of Rule 11, unprovoked by government misconduct, and none of them (so far as the opinions show) involves a case where the defendant asked only to withdraw his plea of guilty, and did not seek specific performance of the plea bargain.

Thus, there are no precedents for what the Court of Appeals did in the present case. It is unauthorized by statute or case law, and violates the Criminal Rules of this Court.

V

This court has recognized many times, from Santobello, supra, onward, that plea negotiations are proper and to be encouraged. This conclusion is obviously not shared by some courts, including the Eighth Circuit (see Chief Judge Gibson's opening sentence in the opinion in this case, referring to "philosophical questions one might have about the effect of plea bargaining on the administration of criminal justice . . ." and the revision of the first opinion in this case upon the government's motion for rehearing without allowing a responsive brief, in the face of Rule 40, Federal Rules of Appellate Procedure, which says that such

petitions "will ordinarily not be granted in the absence of" (a request for an answering brief).

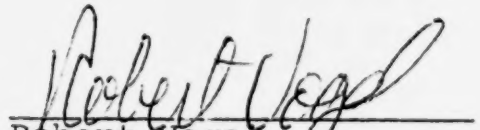
The real danger for the administration of justice which will arise if the decision of the Eighth Circuit is allowed to stand, is that trial judges, some of whom also do not like plea negotiations, will feel free to violate plea arguments, whether by adding unnegotiated items to the sentence or otherwise. If they do, the defendants, faced with sentences they did not agree to, will be put to the trouble and expense, as Clayton Runck was, of appealing to the Court of Appeals for relief. And if judges can ignore the language of Rule 11 that requires them to allow withdrawal of the plea if they reject the agreement and if they are permitted to give "specific performance" instead, such judges will succeed in

emasculating a beneficial and long needed Rule 11.

CONCLUSION

For the reasons stated, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,



Robert Vogel
Counsel for Petitioner
524 Harvard
Grand Forks, ND 58201

IN

SUPREME COURT OF THE UNITED STATES

CLAYTON RUNCK, JR.

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NORTH DAKOTA)
) ss
COUNTY of GRAND FORKS)

Roberta Anderson, being duly sworn on oath deposes and says that she is a citizen of the United States over the age of twenty-one years, and not a party to the above entitled matter;

That on the 15th day of September, 1979, this affiant deposited in the mailing department of the United States Postoffice at Grand Forks, North Dakota, three true and correct copies of the following document filed in the above captioned action:

1. Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

That the copies of the above document were securely enclosed in an envelope with postage duly pre-paid, and addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

To the best of your affiant's knowledge, information and belief, such address as given above was the actual postoffice address of the party intended to be so served.

Roberta Anderson
Roberta Anderson

Subscribed and sworn to before me this 14th day of September, 1979.

Elizabeth S. Morley
Elizabeth S. Morley
Notary Public
Grand Forks County, ND
My commission expires
10/9/80

ELIZABETH S. MORLEY
Notary Public, Grand Forks County, N.D.
My Commission Expires Oct. 9, 1980

FILED
SEP 19 1979
MICHAEL RODAK, JR., CLERK

79-612

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 78-1850 September Term, 1978

United States of America,)
) APPEAL FROM
Appellee,) THE UNITED
) STATES DIS-
vs.) TRICT COURT
) FOR THE
Clayton Runck, Jr.,) DISTRICT OF
) MINNESOTA
Appellant.)

So as to correct a clerical error it is now here ordered that the last sentence of the second paragraph of the Court's opinion filed July 19, 1979, be, and it is hereby, amended to read as follows: "For the reasons hereinafter expressed, we reverse his conviction and remand for resentencing in accordance with this opinion."

July 30, 1979

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 78-1850

United States of America *
*
Appellee, * On Petition for
* Rehearing
v. *
*
Clayton Runck, Jr., *
*
Appellant. *

Submitted: July 9, 1979

Filed: July 19, 1979

Before GIBSON, Chief Judge, ROSS and MCMILLIAN, Circuit Judges.

GIBSON, Chief Judge.

This appeal presents another illustration of the pitfalls and problems arising from plea bargaining. Aside

from any philosophical questions one might have about the effect of plea bargaining in the administration of criminal justice, it is essential that strict adherence to the safeguards articulated by this court in United States v. Gallington, 488 F.2d 637, 640 (8th Cir. 1974), be observed.

Clayton Runck appeals from the denial of his motion for correction or reduction of sentence under Rule 35 of the Federal Rules of Criminal Procedure, or, in the alternative, to have the sentence and plea negotiations vacated and the pleas of guilty withdrawn under Rules 32 and 11 of the Federal Rules of Criminal Procedure. Appellant argues that the sentence imposed on him violated the terms of the plea negotiations and were otherwise invalid as discussed in this opinion. For the reasons hereinafter ex-

pressed, we reverse his conviction and remand this case with directions to permit him to withdraw his guilty plea.

Runck pled guilty to two informations charging mail fraud in violation of 18 U.S.C. ¶ 1341. In the first fraud, Runck created the false appearance of a sale to a dying employee in order to obtain a purchase money loan. Runck then procured life insurance on the life of the employee, with himself as the beneficiary, in order to secure repayment of the loan. Since Runck had made the imaginary sale to a person who was dying and shortly thereafter died, he collected the life insurance proceeds of $25,000. The second information also involved insurance fraud. Runck and an associate bought sunflower seeds for approximately $7,000, but insured them for $109,000. After fire destroyed the seeds, the insurance company

paid approximately $87,000 to settle the loss. Runck and his partner in this fraud split the fraudulent gain.

The plea negotiations provided for Runck to receive a sentence of no more than three years' imprisonment and a $1,000 fine on each count, the prison terms to run concurrently. The negotiation also provided that the pleas of guilty to the two informations would preclude for practical purposes prosecution for a whole list of potential charges against Runck.

Pursuant to the plea bargain, Runck pled guilty to the two informations on April 17, 1978. On June 26, 1978, the District Court imposed sentence. It sentenced Runck to two and one-half years' imprisonment and a $1,000 fine on the first information. On the second information, relating to the insurance proceeds from the pyric destruction of the sun-

flower seeds, the court ordered payment of a fine of $1,000, suspended the imposition of sentence, and placed Runck on probation for three years, which sentence was to be served concurrently with that imposed on the first information. The court also ordered that "a condition of probation is that defendant make restitution as directed by the probation office."

The issue before this court is whether the sentence imposed is in conformity with the negotiated plea agreement. Runck argues that the District Court violated Rule 11 because, although it accepted his guilty pleas, it did not embody in the judgment and sentence on the second information

the disposition provided for in the plea agreement.[1] In particular he argues that the condition of restitution substantially altered the negotiated bargain and that the addition of the condition by the court without consulting either the defendant

---

[1]FED R. CRIM. P. Rule 11(e)(3) provides:

> Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

or the prosecutor exceeded the proper role of the judge.[2] See United States v. Gallington, supra at 640.

We applaud the district judge for ordering restitution and definitely feel that restitution is in order in this

---

[2]Runck also argues that the sentence should be set aside for lack of compliance with the requirements of 18 U.S.C. ¶ 3651, because the court did not specify the actual amount of restitution to be made but provided that the amount should be determined by the probation office. He asserts that the court's order violates the statute because the statute only permits a court to impose restitution as a condition of probation and that it must set the amount of restitution in terms of the actual damages or loss caused by the offense for which conviction was had. While it is unnecessary for us to reach the issue of what 18 U.S.C. ¶ 3651 requires because of our finding that the District Court violated Rule 11 of the Federal Rules of Criminal Procedure, we note that it is a better practice for the court to specify the amount of restitution rather than leave this decision to the probation office.

criminal action. But a plea bargain severely limits the discretion of a sentencing judge. The amount of restitution required in this case is substantial and should have been articulated in the plea bargain or in a proposed amended plea bargain that the accused could accept or reject. While it is true that restitution is merely a condition of probation, the comparative magnitude of the amount of restitution here created a material change in the plea bargain. Although it would be unmanageable and impractical to require every possible condition of probation to be included in a plea bargain, the condition of payment of a sizeable sum of money should have been discussed. While the condition of restitution of a small amount might be acceptable because it would not necessarily materially alter the expectations of the parties to the

bargain, restitution of a large amount should have been part of the plea bargain or the possibility of its inclusion as a condition of probation made known and agreed to by the bargainers.

The law is settled that breach of a plea bargain requires permitting the defendant to plead anew or demand specific performance. Santobello v. New York, 404 U.S. 257, 262-63 (1971). In this case, the judge's addition of the condition or restitition, found to be without the bounds of the plea agreement, was not requested by the Government attorneys. The Government attorneys strictly adhered to the bargain made in the plea agreement, and argue that a rejection of the agreement at this time would unfairly prejudice them because of their reliance on the agreement. It is also clear that the District Court intended to accept the

agreement, and merely assumed that the condition of restitution was within the ambit of the plea agreement. In these circumstances we find that the appropriate procedure to provide relief from the breach of the plea agreement is to require specific performance of the agreement. This is the most expeditious method of rendering justice to both sides; no unfairness to the defendant will result from providing him with satisfaction of the bargain he accepted. Thus, Runck must be resentenced in accordance with the plea agreement, without the imposition of this condition of probation.

The decision of the District Court is reversed and the case remanded to the District Court for resentencing in accordance with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 78-1850

United States of America,	*	
	*	
Appellee,	*	On Petition
	*	for Rehear-
v.	*	ing
	*	
Clayton Runck, Jr.,	*	
	*	
Appellant.	*	

Submitted: July 9, 1979

Filed: July 19, 1979

Before GIBSON, Chief Judge, ROSS and McMILLIAN, Circuit Judges.

O R D E R

Upon rehearing of this appeal from the United States District Court for the

District of Minnesota, the opinion filed May 16, 1979, is withdrawn and the attached opinion is filed in its place.

Order entered at the direction of Chief Judge Gibson, Judge Ross, and Judge McMillian.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 78-1850

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Clayton Runck appeals from the denial of his motion for correction or reduction of sentence under Rule 35 of the Federal Rules of Criminal Procedure, or, in the alternative, to have the sentence and plea negotiations vacated and the pleas of guilty withdrawn under Rules 32 and 11 of the Federal Rules of Criminal Procedure. Appellant argues that the sentence imposed on him violated the terms of the plea negotiation and were otherwise invalid as discussed in this opinion. For the reasons hereinafter expressed,

we reverse his conviction and remand this case with directions to permit him to withdraw his guilty plea.

Runck pled guilty to two informations charging mail fraud in violation of 18 U.S.C. ¶ 1341. In the first fraud, Runck created the false appearance of a sale to a dying employee in order to obtain a purchase money loan. Runck then procured life insurance on the life of the employee, with himself as the beneficiary, in order to secure repayment of the loan. Since Runck had made the imaginary sale to a person who was dying and shortly thereafter died, he collected the life insurance proceeds of $25,000. The second information also involved insurance fraud. Runck and an associate bought sunflower seeds for approximately $7,000, but insured them for $109,000.

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The plea negotiations provided for Runck to receive a sentence of no more than three years' imprisonment and a $1,000 fine on each count, the prison terms to run concurrently. The negotiation also provided that the pleas of guilty to the two informations would preclude for practical purposes prosecution for a whole list of potential charges against Runck.

Pursuant to the plea bargain, Runck pled guilty to the two informations on April 17, 1978. On June 26, 1978, the District Court imposed sentence. It sentenced Runck to two and one-half years' imprisonment and a $1,000 fine on the

first information. On the second information, relating to the insurance proceeds from the pyric destruction of the sunflower seeds, the court ordered payment of a fine of $1,000, suspended the imposition of sentence, and placed Runck on probation for three years, which sentence was to be served concurrently with that imposed on the first information. The court also ordered that "a condition of probation is that defendant make restitution as directed by the probation office."

The issue before this court is whether the sentence imposed is in conformity with the negotiated plea agreement. Runck argues that the District Court violated Rule 11 because, although it accepted his guilty pleas, it did not embody in the judgment and sentence on the second

information the disposition provided for in the plea agreement.[1] In particular he argues that the condition of restitution substantially altered the negotiated bargain and that the addition of the condition by the court without consulting either the defendant or the prosecutor

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[1]FED R. CRIM. P. Rule 11(e)(3) provides:

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exceeded the proper role of the judge.[2] See United States v. Gallinton, supra at 640.

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[2]Runck also argues that the sentence should be set aside for lack of compliance with the requirements of 18 U.S.C. ¶ 3651, because the court did not specify the actual amount of restitution to be made but provided that the amount should be determined by the probation office. He asserts that the court's order violates the statute because the statute only permits a court to impose restitution as a condition of probation and that it must set the amount of restitution in terms of the actual damages or loss caused by the offense for which conviction was had. While it is unnecessary for us to reach the issue of what 18 U.S.C. ¶ 3651 requires because of our finding that the District Court violated Rule 11 of the Federal Rules of Criminal Procedure, we note that it is a better practice for the court to specify the amount of restitution rather than leave this decision to the probation office.

We applaud the district judge for ordering restitution and definitely feel that restitution is in order in this criminal action. But a plea bargain severely limits the discretion of a sentencing judge. The amount of restitution required in this case is substantial and should have been articulated in the plea bargain or in a proposed amended plea bargain that the accused could accept or reject. While it is true that restitution is merely a condition of probation, the comparative magnitude of the amount of restitution here created a material change in the plea bargain. Although it would be unmanageable and impractical to require every possible condition of probation to be included in a plea bargain, the condition of payment of a sizeable sum of money should have been discussed. While

the condition of restitution of a small amount might be acceptable because it would not necessarily materially alter the expectations of the parties to the bargain, restitution of a large amount should have been part of the plea bargain or the possibility of its inclusion as a condition of probation made known and agreed to by the bargainers.

The law is settled that breach of a plea bargain requires permitting the defendant to plead anew or demand specific performance. Santobello v. New York, 404 U.S. 257, 262-63 (1971). The judge's addition of the condition of restitution, found to be without the bounds of the plea agreement, can be considered to amount to a rejection by the judge of the plea bargain. Thus, Runck must be given an opportunity to withdraw his plea.

United States v. Gallington, supra at 640.

The decision of the District Court is reversed. The judgment and sentence entered against Runck on his plea of guilty is vacated with the right reserved to the United States to take further action against Runck on these and the other charges included in the plea bargain as is appropriate.

A true copy.

Attest:

CLERK, U. S. COURT OF
APPEALS, EIGHTH CIRCUIT.

IN THE

SUPREME COURT OF THE UNITED STATES

CLAYTON RUNCK, JR.

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NORTH DAKOTA)
) ss
COUNTY OF GRAND FORKS)

Roberta Anderson, being duly sworn on oath deposes and says that she is a citizen of the United States over the age of twenty-one years, and not a party to the above entitled matter;

That on the 19th day of September, 1979, this affiant deposited in the mailing department of the United States Postoffice at Grand Forks, North Dakota, three true and correct copies of the following document filed in the above captioned action:

1. Opinions Below.

That the copies of the above document were securely enclosed in an envelope with postage duly pre-paid, and addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

To the best of your affiant's knowledge, information and belief, such address as given above was the actual postoffice address of the party intended to be so served.

Roberta Anderson
Roberta Anderson

Subscribed and sworn to before me this 18th day of September, 1979.

Elizabeth S. Morley
Elizabeth S. Morley
Notary Public
Grand Forks County, ND
My commission expires
10/9/80

ELIZABETH S. MORLEY
Notary Public, Grand Forks County, N.D.
My Commission Expires Oct. 9, 1980

FILED
DEC 6 1979
MICHAEL RODAK, JR., CLERK

No. 79-612

In the Supreme Court of the United States

OCTOBER TERM, 1979

CLAYTON RUNCK, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-612

CLAYTON RUNCK, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he is entitled to withdrawal of his guilty plea rather than to specific performance of the plea agreement because, in initially sentencing him, the district court imposed a condition that was beyond the scope of the plea agreement.

1. On April 17, 1978, petitioner pleaded guilty in the United States District Court for the District of Minnesota to two informations, each of which charged a single count of mail fraud, in violation of 18 U.S.C. 1341. Petitioner and the government agreed that, in exchange for the pleas of guilty, petitioner would receive a sentence of no more than three years' imprisonment and a $1,000 fine on each count. It was further agreed that the prison terms would run concurrently and that

the government would not prosecute petitioner on other mail fraud charges then under investigation (Tr. 7-9, 28).[1]

After determining that petitioner fully understood the terms of the agreement, the trial judge accepted the guilty pleas (Tr. 24-25, 35-40). The court then sentenced petitioner to two and one-half years' imprisonment and a $1,000 fine on the first informaion, to be followed by a consecutive three-year term of probation on the second information. The court also required that petitioner pay restitution of $40,000 as a condition of his probation. Petitioner moved to amend the sentence on the ground that it did not comport with the plea agreement. In response, the court amended the sentence by making the term of probation concurrent with the sentence of imprisonment. The court also amended the restitution condition by eliminating the requirement that petitioner pay restitution of $40,000 and ordered petitioner to make restitution in an amount to be set by the probation office.

On appeal, petitioner contended that the imposition of the condition of restitution materially altered the plea bargain and that he therefore should be allowed to withdraw his guilty plea. The court of appeals initially ordered the district court to allow petitioner to withdraw his plea, (Pet. App. 14-23). On rehearing, however, the court withdrew its initial decision, finding that, although the condition of restitution was outside the scope of the plea agreement, the intent of the trial judge to accept the plea was clear (Pet. App. 10-11). The court of appeals

[1]"Tr." refers to the transcript of the district court proceedings on April 17, 1978, at which petitioner pleaded guilty.

remanded the case to the district court for resentencing so that petitioner could be provided with "satisfaction of the bargain he accepted" (Pet. App. 11).

3. Petitioner contends that he is automatically entitled to withdraw his guilty plea because the district court imposed a sentencing condition that was beyond the scope of the agreement negotiated by petitioner and the government. This contention lacks merit. Moreover, the decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

a. At the outset, we note that the sentence finally imposed by the trial court substantially reflected the terms of the plea bargain. It was agreed that petitioner could be sentenced to as much as three years' imprisonment on each count and that the sentences would be concurrent. Petitioner's sentence of two and a half years' imprisonment on the first count was well within the permissible range of sentencing under the agreement. Although the court conditioned petitioner's concurrent three year probation term on his making some form of restitution, if petitioner elected not to make restitution, his resulting sentence would only be three years' imprisonment — the exact maximum sentence petitioner agreed to accept. Under these circumstances, petitioner cannot properly complain that the sentence he received was more than he bargained for.

b. In any event, even if the inclusion of the restitution provision transcended the scope of the plea agreement, petitioner is not automatically entitled to withdraw his guilty plea. As this Court recognized in *Santobello* v. *New York*, 404 U.S. 257, 263 (1971), whether the appropriate remedy for breach of a plea agreement is withdrawal of the plea or merely resentencing depends

on the circumstances of each case. When, as here, courts have been confronted with added or unperformed terms of a plea agreement, specific performance rather than vacation of the plea has been the usual remedy. *E.g.*, *United States* v. *Bowler*, 585 F. 2d 851, 856 (7th Cir. 1978); *Palermo* v. *Warden*, 545 F. 2d 286, 296-297 (2d Cir. 1976), cert. dismissed, 431 U.S. 911 (1977); *Baker* v. *Finkbeiner*, 551 F. 2d 180, 184 (7th Cir. 1977); *Correale* v. *United States*, 479 F. 2d 944, 950 (1st Cir. 1973).

The court of appeals correctly determined that specific performance is the appropriate remedy in this case. The sentence on Count One is unaffected by the claimed defect in the sentence on Count Two. And the restitution provision in the sentence on Count Two can easily be removed at resentencing. Whether the district court decides at resentencing that petitioner should receive a three year term of imprisonment on the second count or be placed on probation without any restitution requirement, petitioner will receive no greater sentence than he bargained for. Moreover, in the interim, petitioner has suffered no prejudice as a result of the restitution provision because his sentence on the two counts has run concurrently.

On the other hand, vacation of the guilty plea at this point would unfairly injure the government, which has relied on the agreement by discontinuing the investigation of several suspected offenses by petitioner. See *Santobello* v. *New York*, *supra*, 404 U.S. at 263; *id.* at 267-268 (Marshall, J.) (concurring in part and dissenting in part).[2] With these considerations in mind, the court of appeals correctly remanded this case for resentencing.

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[2]The plea agreement included a promise by the government not to prosecute other mail fraud offenses that were being investigated at the time of the plea negotiations. In compliance with this undertaking, the government terminated its investigation of petitioner's involvement in a fire insurance scheme stemming from a fire in a building on March 24, 1973. Inasmuch as the five-year period of the applicable statute of limitations has now expired, the government may be precluded from prosecuting petitioner for this suspected offense even if the agreement is rescinded and further investigation establishes that prosecution is warranted.

The government also relied upon the plea agreement in another way. On February 7 and February 9, 1979, after obtaining a grant of immunity, the government questioned petitioner before a federal grand jury investigating the involvement of petitioner's accomplice in the mail fraud schemes. As the result of this grand jury appearance, the government would bear a substantial burden at retrial to demonstrate not only that petitioner is guilty beyond a reasonable doubt, but also that the evidence used at trial was obtained independently and not as the result of the immunized testimony. See *Kastigar* v. *United States*, 406 U.S. 441, 461-462 (1972); *United States* v. *McDaniel*, 482 F. 2d 305, 311-312 (8th Cir. 1973).

[3]Rule 11(e)(3) provides:

> If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

There is no merit to petitioner's claim that specific performance of a plea agreement is never appropriate when noncompliance with the agreement is the result of judicial failure to advise the defendant of an unconsented addition of a sentencing provision under Fed. R. Crim. P. 11(e)(3).[3] This is not a case where the trial judge wholly disregarded the provisions of Rule 11. Rather, as the court below correctly held (Pet. App. 10-11), the district judge fully intended to accept the guilty plea under Rule 11 and his inclusion of the probation condition manifested at most a misinterpretation of the agreement that had been negotiated by the parties.